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No. 82-117

In the Supreme Court of the United States

OCTOBER TERM, 1982

RALPH FREDERICK NUNZIATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner waived his right to appeal non-jurisdictional errors by failing to state his intention to enter a plea of guilty conditioned on being able to appeal.

2. Whether the court of appeals correctly held that petitioner's claims of error were non-jurisdictional and therefore waived by his guilty plea.

3. Whether petitioner's guilty plea was knowing and voluntary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported. The opinions of the district court (Pet. App. 6a-8a, 9a-10a and 11a-13a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1982. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 19, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 23, 1981, petitioner pleaded guilty in the United States District Court for the Eastern District of New York to one count in a 15-count indictment, which alleged transportation of an unregistered firearm in interstate

commerce in violation of 26 U.S.C. 5861(j), 5871 and 18 U.S.C. 2. He was sentenced to six years' imprisonment. The court of appeals affirmed (Pet. App. 1a-5a, 12a-13a).

On August 12, 1980, petitioner was arrested on a complaint charging him with illegally transporting a firearm (a partly assembled M-16 rifle) in interstate commerce, in violation of 18 U.S.C. 922(g)(1).[1] On September 18, 1980, on the government's motion, the complaint was dismissed (C.A. App. 7a). Petitioner did not, however, seek, either before or after the government's motion, to have the complaint dismissed with prejudice.[2]

On May 14, 1981, petitioner was indicted in a fifteen-count indictment returned in the United States District Court for the Eastern District of New York, charging him with various firearms violations (Pet. App. 7a; C.A. App. 8a-13a). Counts 5 and 6 of the indictment referred to the same firearm that was the subject of the earlier complaint. The indictment alleged, however, that petitioner violated a different statute, 26 U.S.C. 5861(d) and (j), which prohibits possession and transportation of an unregistered firearm.

Petitioner moved to dismiss the indictment as barred by the Speedy Trial Act of 1974, 18 U.S.C. 3152 *et seq.* He did not challenge the government's failure to act within 30 days

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[1]Section 922(g)(1) makes it unlawful for anyone who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport a firearm in interstate commerce. Petitioner had previously been convicted of a felony in the State of New York (C.A. App. 5a) ("C.A. App." refers to the appendix in the court of appeals).

[2]Under the Speedy Trial Act of 1974, an information or indictment must be filed within thirty days after an individual is arrested. 18 U.S.C. 3161(b). The Act provides for dismissal of the complaint for violation of this time limit, but, by its own terms, dismissal may be without prejudice. 18 U.S.C. 3162.

after his arrest,[3] but rather claimed that the government had delayed unreasonably in waiting more than a year before bringing the indictment (C.A. App. 15a-16a). The district court denied the motion (Pet. App. 6a-8a). Petitioner then entered a plea of guilty to Count 6 of the indictment—transportation of an unregistered firearm—which the district court accepted after a full hearing in accordance with Fed. R. Crim. P. 11 (Pet. App. 14a).

Petitioner subsequently moved pursuant to Fed. R. Crim. P. 32(d) to withdraw his guilty plea, arguing for the first time that there was a variance between the charge in the indictment and his admissions in pleading guilty at the Rule 11 hearing (C.A. App. 60a-61a). Specifically, he claimed that the indictment charged him with transporting an unregistered firearm, namely an "M-16 receiver," but that he admitted to shipping "the rear half of a demilitarized M-16 receiver, or a part of it" (*id.* at 61a). Petitioner asserted that the partly assembled M-16 was not a "firearm" within the meaning of the statute. Petitioner also renewed his previously denied speedy trial motion, claiming that the original decision was based on erroneous dates (*id.* at 63a-64a).

The district court denied petitioner's motion to withdraw his guilty plea, finding that he had "admit[ted] his guilt in the clearest terms" and had failed to show that his plea was

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[3]In petitioner's motion to dismiss the indictment, his counsel used incorrect dates for petitioner's arrest and the dismissal of the complaint, using August 1, 1980 as the date of arrest instead of August 12, and September 1, 1980, for the dismissal instead of September 18. When the court denied the motion, it relied on the correct date of arrest, having been informed by the government of that error, but on the incorrect date of dismissal. The court thus incorrectly concluded that the dismissal had been within the thirty-day time limit (Pet. App. 8a). On the following day, however, the government notified the court of the correct date of dismissal of the complaint, and a copy of that letter was sent to petitioner (C.A. App. 7a, 33a).

not intelligently, knowingly and voluntarily made (Pet. App. 11a-13a). The court also denied the speedy trial motion for the reasons stated in its previous order and because petitioner's objection to that order was untimely (*id.* at 9a-10a).

2. The court of appeals dismissed petitioner's appeal from the denial of his speedy trial motion, finding that he waived his right to appeal by pleading guilty without making any attempt to condition his plea on a reservation of his right to appeal (Pet. App. 2a-4a).[4] The court of appeals affirmed the denial of petitioner's motion to withdraw his guilty plea, finding that there was an adequate factual basis for the plea and that petitioner, by pleading guilty, had waived his right to have a jury determine the factual issue of whether the weapon was a "firearm" within the meaning of the statute (*id.* at 4a-5a).

ARGUMENT

1. Petitioner first contends (Pet. 9-13) that the courts of appeals follow conflicting practices with regard to conditional guilty pleas, and that the Second Circuit's requirement of consent by the government and district court is in conflict with other circuits. Even accepting petitioner's observation that the availability of a conditional guilty plea, in which a defendant reserves the right to appeal certain legal issues while pleading guilty, varies in the different circuits, it is clear that no court of appeals would have allowed petitioner to appeal, because he made absolutely no attempt to condition his guilty plea on a right to appeal. See *United States* v. *DePoli*, 628 F. 2d 779, 781 n.1 (2d Cir.

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[4]The court noted that even if petitioner had preserved his speedy trial objection, it was "far from clear" that he would have prevailed because he had failed to request that the complaint against him be dismissed with prejudice prior to the time the government moved to dismiss without prejudice (Pet. App. 4a n.*).

1980). Petitioner has cited no case allowing appeal from a guilty plea where the defendant has failed to reserve his right expressly. See *United States* v. *Moskow*, 588 F. 2d 882, 884 (3d Cir. 1978). Thus, this case presents no occasion to review the practices in the courts of appeals regarding conditional guilty pleas.

2. Petitioner argues (Pet. 14-17) that the court of appeals erred in holding that his claims on appeal were non-jurisdictional and therefore waived by his guilty plea. He contends that both his speedy trial claim and his claim that the partly assembled M-16 rifle was not a firearm were jurisdictional defects and thus were reviewable after a guilty plea.

The law is clear that a guilty plea conclusively establishes the defendant's factual guilt, and accordingly waives all defects in the prosecution, even constitutional claims, except those relating to lack of jurisdiction, *i.e.*, the power of the court to hale a defendant before it. *Menna* v. *New York*, 423 U.S. 61, 62 (1975); *Blackledge* v. *Perry*, 417 U.S. 21, 29-31 (1974); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Applying these principles, the court of appeals correctly found (Pet. App. 2a) that a claim of a statutory speedy trial violation, which requires dismissal only in the discretion of the court, is not a jurisdictional defect. See *United States* v. *Mann*, 451 F. 2d 346, 347 (2d Cir. 1971); cf. *United States* v. *Doyle*, 348 F. 2d 715, 719 (2d Cir.), cert. denied, 382 U.S. 843 (1965).[5]

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[5]Petitioner claims that the decision below on this issue conflicts with that of the First Circuit in *United States* v. *DeCosta*, 435 F. 2d 630, 632 (1970). In fact, however, the court in that case made no ruling on the question whether a constitutional speedy trial claim is waived by a plea of guilty, declaring on the merits that there had been no speedy trial violation. *DeCosta* is similar to this case in this regard since it is unlikely that petitioner would have prevailed on the merits of his statutory speedy trial claim, even if it had not been barred. See note 4, *supra*.

With respect to the claim that the item petitioner admitted shipping was not a firearm, the question whether the M-16 receiver, or part of it, was included within the statute's prohibition is an issue of fact that would have properly been resolved at trial.[6] *LaMagna* v. *United States*, 646 F. 2d 775, 777-778 (2d Cir. 1981), cert. denied, 454 U.S. 898 (1981); see also *United States* v. *Benson*, 579 F. 2d 508, 509 (9th Cir. 1978). By pleading guilty and unequivocally admitting that he had committed the acts charged in Count 6 of the indictment (C.A. App. 25a), however, petitioner finally resolved this factual issue just as if a jury had rendered a guilty verdict. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).[7] Accordingly, the issue was not appealable after the guilty plea.

3. Finally, petitioner contends (Pet. 17-22) that his guilty plea was not voluntarily made because he did not receive competent advice from his counsel. Specifically, petitioner argues that his counsel's error in specifying the dates relating to his speedy trial claim, the subsequent failure to renew the claim once he had been advised of the proper dates, and

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[6]The definitional section of the statute includes in the definition of "firearm" a machinegun (26 U.S.C. 5845(a)(6)). "Machinegun" includes "the frame or receiver of any such weapon." 26 U.S.C. 5845(b). Thus, the part of an M-16 listed in the indictment would seem to fit the definition. Whether it did, of course, would have been an issue for the jury, but for petitioner's guilty plea.

[7]Petitioner claims (Pet. 15-16) that the decision in this case conflicts with a number of other cases in which the courts have held that the failure of an indictment to allege an offense is a jurisdictional defect that may be raised at any time, even after a guilty plea. Petitioner's quarrel is not, however, with the legal sufficiency of the indictment itself, which plainly alleges all the elements of an offense under the statute charged (C.A. App. 10a). Rather, his argument concerns the nature and sufficiency of the proof that the government would have been required to adduce at trial to establish guilt on the charge as alleged in the indictment.

the failure to advise petitioner that he could argue that the partly assembled M-16 part was not a "firearm," amounted in combination to incompetent advice of counsel that negated the intelligent and knowing character of his guilty plea. See *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970). Petitioner's fact-bound claim is without merit.

In *McMann* v. *Richardson, supra*, 397 U.S. at 770-771, this Court rejected the notion that the adequacy of counsel in regard to a guilty plea depends on a retrospective assessment of whether the attorney's legal judgment was "right or wrong." What matters is whether petitioner's interests have been faithfully represented, *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and the court of appeals expressly found (Pet. App. 4a) that counsel had negotiated "an advantageous plea bargain," which was not undermined by the failure to make a dubious speedy trial argument or to discuss with petitioner the remote possibility that one count in a 15-count indictment might be rejected by a jury because of the nature of the firearm at issue. As the court of appeals found, petitioner's complaint is not with the adequacy of the representation of his attorney but rather "with the unexpected severity of his sentence" (*id.* at 4a). Accordingly, the adequacy of petitioner's representation at the time of his guilty plea raises no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

DOJ-1982-09